

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

The legal treatment of corporations has been a source of prolific academic commentary and criticism. Much of it—the commentary concerned generally with the relationship between business enterprise and society—is beyond the scope of this symposium. Rather the symposium focuses more narrowly on the peculiarities of the corporate form and the laws regulating corporate behavior.

In the past fifty years, writing about corporation law has pursued several distinct lines of inquiry. One such line of analysis began with Berle and Means' demonstration that ultimate legal ownership was separate from effective control in large publicly held corporations.<sup>1</sup> Finally persuaded that corporate owners were content to leave managing to professional managers, this school of criticism advocated increased disclosure about corporations to public investors as a means of enhancing the capacity of market mechanisms to check management behavior. Section 14(a) of the Securities Exchange Act of 1934 also responded to the separation of ownership from control by attempting to create working shareholder democracies—or, at the least, voting republics—through a system of federal proxy regulation. Its underlying theory postulated that shareholders would be better able to call a corporation's managers to account if they were given certain pieces of information about the corporation's business and the consequences of decisions which state corporation law requires shareholders to make. This school of writing about the corporation has acquired its own complementary school of critics and skeptics who analyze the purported benefits of disclosure, quantify its costs, and examine the relevance of the information disclosed to the decisions made by shareholders and investors, or prospective shareholders.

Wholly apart from efforts to increase the accountability of corporate managers through the flow of corporate information to the market and shareholders, much attention has been given to the proper relationship between federal and state regulation of internal corporate decisions. Some critics of corporate theory have been troubled by the conflict in both tone and substance between the constraints imposed on internal corporate functions by state corporation laws and those imposed by the federal securities laws. Out-

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1. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

right federal incorporation or minimum federal requirements for state regulation of corporate behavior have been suggested as a solution to this untidy conflict as well as to the substantive deficiencies of promanagement state incorporation laws, perceived by many as insufficiently protective of various shareholder concerns. These proposals pose significant questions about their implications for concerns tangential to federalism—for example, jurisdictional and other litigation-allocating devices—as well as traditional corporate-law matters. Indeed, some argue that these proposals are solutions in search of problems, that state corporation laws afford adequate protection to legitimate shareholder interests, and that there have been intimations on the state-court level of a renaissance in the enforcement of managers' fiduciary duties toward the corporation and its minority shareholders.

A separate school of academic criticism has examined the impact of corporate decisions on interests outside the corporation. Its initial concern was whether corporations have a duty to behave in socially responsible ways even if that behavior could not be justified as increasing the corporation's profitability. More recently the focus of this criticism has shifted to an examination of corporations' internal structure and decisionmaking processes and to an argument that the present internal structure of corporations increases the likelihood of harmful corporate behavior. Related in interest, perhaps, if not in ideology, are those critics who examine and criticize corporations' internal structure with an eye to its effectiveness in controlling management behavior.

Many of the energies of corporation-law reformers at midcentury were taken up with efforts to reshape the law to permit greater flexibility in corporate structure and operation, especially for closely held corporations. The near-complete victory of these reformers effectively demystified the corporation, took away rigid legal definitions of its characteristics, and left it as the mere result of private contract. Thus, in the view of one critic, when American law ceased to take the corporation seriously, it eliminated the legitimacy of scholarly interest in the corporation, and "corporation law, as a field of intellectual effort, [was] dead in the United States."<sup>2</sup> Dead once, perhaps, but never interred, corporate-law scholarship has been reborn in its present protean form as an inquiry into changes in corporate structure and regulatory reform aimed at effective constraints on management misbehavior and more efficient securities markets. This symposium, *Law and Contemporary Problems'* third venture into corporation law,<sup>3</sup> is an indication of the diversity and vitality of contemporary scholarship about the corporation.

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2. Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962).

3. The two previous symposia were THE CLOSE CORPORATION, 18 LAW & CONTEMP. PROB. 433 (R. Kramer ed. 1953) and THE NEW LOOK IN CORPORATION LAW, 23 LAW & CONTEMP. PROB. 175 (M. Shimm ed. 1958).